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CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY DEPUTY

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

BRYAN D. SMITH,

Petitioner,

vs.

DOMINGO URIBE, Warden,

Respondent.

CASE NO. 10cv545 BEN (JMA)

**ORDER ADOPTING REPORT
AND RECOMMENDATION**

Petitioner Bryan D. Smith, a state prisoner proceeding pro se, filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. Respondent filed a motion to dismiss based on Petitioner's failure to exhaust all four of his claims.

On November 9, 2010, the Honorable Magistrate Judge Jan M. Adler issued a Report and Recommendation, recommending that the Court find that Petitioner has filed a mixed petition, notify Petitioner that he should inform the Court as to how he chooses to proceed with his mixed petition within 30 days, and deny the motion to dismiss without prejudice. Dkt. No. 14. Any objections to the Report and Recommendation were due November 17, 2010. *Id.* No objections have been filed. For the reasons stated below, the Court ADOPTS the well-reasoned Report and Recommendation of the Magistrate Judge.

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1 A district judge “may accept, reject, or modify the recommended disposition” of a
2 Magistrate Judge on a dispositive matter. FED. R. CIV. P. 72(b)(3); *see also* 28 U.S.C.
3 §636(b)(1). “[T]he district judge must determine de novo any part of the [report and
4 recommendation] that has been properly objected to.” FED. R. CIV. P. 72(b)(3). However,
5 “[t]he statute makes it clear that the district judge must review the magistrate judge’s findings
6 and recommendations de novo *if objection is made*, but not otherwise.” *United States v.*
7 *Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc), *cert denied*, 540 U.S. 900 (2003)
8 (emphasis in original); *see also Wang v. Masaitis*, 416 F.3d 992, 1000 n.13 (9th Cir. 2005).
9 “Neither the Constitution nor the statute requires a district judge to review, de novo, findings
10 and recommendations that the parties themselves accept as correct.” *Reyna-Tapia*, 328 F.3d
11 at 1121.

12 In the absence of any objections, the Court **ADOPTS** the Report and Recommendation
13 in its entirety. The Court finds Petitioner has filed a mixed petition containing exhausted and
14 unexhausted claims and notifies Petitioner that he should inform the Court how he chooses to
15 proceed with his mixed petition in accordance with the options and deadlines outlined in the
16 Report and Recommendation. The motion to dismiss is **DENIED** without prejudice.

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18 **IT IS SO ORDERED.**

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20 DATED: November 18, 2010



Hon. Roger T. Benitez
United States District Court